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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 1010

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WILLIAM BENJAMIN CRAIG,

*Petitioner,*

—v.—

FLORIDA.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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JACK GREENBERG
JAMES M. NABRIT, III
LEROY D. CLARK
MICHAEL MELTSNER
CHARLES STEPHEN RALSTON
10 Columbus Circle
New York, New York 10019

TOBIAS SIMON
H. W. DIXON
MAURICE ROSEN
223 Southeast First Street
Miami 32, Florida

*Attorneys for Petitioner*

JAY H. TOPKIS
575 Madison Avenue
New York, New York

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pennsylvania

*Of Counsel*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above-entitled case on October 13, 1965.

### Opinion Below

The opinion of the Supreme Court of Florida and the dissenting opinion of Judge Ervin are reported at 179 So.2d 202. They are set forth in the Appendix, pp. 1a-16a.

### Jurisdiction

The judgment of the Supreme Court of Florida was entered October 13, 1965. The time for filing this petition for writ of certiorari was extended by Mr. Justice Fortas to and including February 11, 1965. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

## Questions Presented

1. Petitioner, a Negro, has been sentenced to death for the rape of a white woman. He has shown that in the past twenty-five years only one white man has been executed for rape, and that for the rape of a white child under aggravated circumstances. On the other hand, twenty-nine Negroes have been executed, all for the rape of white adult women. No white or Negro male has ever been executed for the rape of a Negro, child or adult. In contrast, the number of Negroes convicted for rape is only slightly higher than the number of whites. Under these circumstances, has petitioner made sufficient showing of a denial of the equal protection of the laws in violation of the Fourteenth Amendment to require the State to come forward with some evidence that the disproportion of Negroes executed for rape is not accounted for by race?

2. Does the imposition of the death penalty for the offense of rape by the State of Florida on the basis of the jury's unfettered, unreviewable discretion constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

3. Does the assigning to the jury in a capital rape case under Florida law the function of deciding simultaneously both the guilt of the defendant and the penalty to be inflicted constitute a denial of due process of law in violation of the Fourteenth Amendment?

## Constitutional and Statutory Provisions Involved

This case involves the Eighth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statute of the State of Florida:

> Section 794.01—Rape and forcible carnal knowledge; penalty.
>
> Whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be punished by death, unless a majority of the jury in their verdict recommend mercy, in which event punishment shall be by imprisonment in the state prison for life, or for any term of years within the discretion of the judge. It shall not be necessary to prove the actual emission of seed, but the crime shall be deemed complete upon proof of penetration only.

## Statement

Petitioner William Benjamin Craig was indicted on June 6, 1963, by the Grand Jury of Leon County, Florida for the crime of rape upon a female person over the age of ten years. Petitioner Craig is a Negro and the victim is an adult white female. He was tried before a jury in the Circuit Court of the Second Judicial Circuit in and for Leon County. Under provisions of Florida law, the same jury considered simultaneously the questions of the guilt of petitioner and the sentence to be imposed. The jury returned a verdict of guilty without a recommendation of mercy on June 20, 1963 (R., p. 6).

On June 27, 1963, a judgment and sentence of death was entered by the Court. An appeal was taken from the verdict and sentence, they were affirmed October 21, 1964, by the Supreme Court of Florida (*Craig* v. *State,* 168 So.2d

747; R., pp. 32-34), and an order denying a petition for rehearing was entered December 7, 1964.

On February 10, 1965 petitioner filed a motion for reduction of sentence from death to life imprisonment or less in the Circuit Court of Leon County. The bases for the motion were that:

(1) Imposition of the death penalty on petitioner denied him the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States because the death penalty had been used as an instrument of racial discrimination against Negroes convicted of the rape of white women.

(2) The procedure under Florida law which allows the jury which determines the guilt of a person accused of rape also to determine simultaneously the punishment to be imposed violated the due process clause of the Fourteenth Amendment.

(3) The imposition of the death sentence for rape subjected the petitioner to cruel and unusual punishment and violated due process of law in violation of the Eighth and Fourteenth Amendments to the Constitution. (See Record, pp. 8-10.)

In support of this motion the petitioner introduced statistical data regarding the imposition of the death penalty for rape. The State did not object to or contradict the data and it was accepted as accurate by the trial court in deciding the motion for reduction of sentence (R., p. 26).[1] The motion for reduction of sentence was

[1] The Court said:

The Defendant offered to prove up the statistics therein contained with the respective files of each of the 285 convictions from the several Florida counties involved should this Court feel such proof

denied in the trial court on February 17, 1965 (R., p. 26). An appeal was taken to the Supreme Court of Florida, and on October 13, 1965, the decision of the trial court was affirmed by the Supreme Court of Florida (179 So.2d 202). (Appendix, pp. 1a-3a.) Judge Ervin dissented on the ground that by permitting the same jury to decide both the guilt and punishment of the petitioner the State had denied due process of law in violation of the Fourteenth Amendment to the United States Constitution (179 So.2d at 204-210). (Appendix, pp. 3a-16a.)

## Capital Punishment for Rape

In his motion for reduction of sentence, petitioner maintained that Section 794.01 of the Florida statutes, which imposes the death sentence for the crime of rape, was unconstitutional as applied to him. In support of this contention, statistics were introduced which revealed the pattern of discrimination against Negroes in the imposition of the death sentence.[2] The statistics, which were ac-

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desirable or necessary in addition to the verification of the memorandum brief by counsel. This Court does not feel that such proof is required, desirable or necessary, and for the purposes of this motion accepts the statistics contained in the memorandum as substantially correct. The State of Florida voiced no objection to this procedure (R., p. 26).

[2] This footnote sets out in tabular form the statistics discussed in the text *infra*:

TABLE A

RAPE CONVICTIONS 1940-1964

| TOTAL: | DEFENDANT | | | VICTIM | |
|---|---|---|---|---|---|
| | (Negro) | (White) | (Indian) | (Negro) | (White) |
| 285[a] | 152 | | | 68[b] | 84[c] |
| | | 132 | | 7 | 125[d] |
| | | | 1 | 0 | 1 |

*(footnote 2 continued on next page)*

cepted as accurate by the trial court, may be summarized as follows:

During the 25-year period between January 1, 1940 to December 31, 1964, there have been a total of 285 convictions for the crime of rape for which information concerning the race of the victims and the defendants is available.[2] (R., p. 18) One hundred and thirty-two white men, or 46% of the total, have been convicted for the rape of 125 white and 7 Negro women (*Ibid.*). One hundred and fifty-two Negro men, or 54% of the total, have been convicted for the rape of 84 white and 68 Negro women (*Ibid.*). The remaining conviction was that of an Indian who raped

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[2] *(continued)* TABLE B

DISPOSITION OF 54 RAPE DEFENDANTS SENTENCED TO DEATH, BY RACE OF DEFENDANT AND RACE OF VICTIM—1940-1964

| | | Defendant | | Victim | |
|---|---|---|---|---|---|
| | | Negro | White | Negro | White |
| 30 | Electrocutions | 29 | | 0 | 29 |
| | | | 1 | | 1[e] |
| 5 | Commutations | 2 | | 0 | 2 |
| | | | 3 | 0 | 3[e] |
| 12 | Awaiting Execution | 12 | | 2[e] | 10 |
| 1 | Killed | 1 | | 0 | 1 |
| 6 | Death Judgment Reversed | 4 | | 1 | 3 |
| | | | 2 | 0 | 2 |
| Totals 54 | | 48 | 6 | 3 | 51 |

a—Excluding 13 cases from Brevard and Hillsborough Counties because race information is unavailable.

b—Includes 26 children under 14.

c—Includes 3 children under 14.

d—Includes 34 children under 14.

e—Children under 14.

(R., pp. 21-22)

[3] There were 13 other cases in two counties for which no information as to race was available (R., p. 18).

a white woman. Fifty-four men have been sentenced to death for rape; 48 Negroes and six whites (R., p. 14).

There have been 125 cases of white females being raped by white men; 34 of the victims were children under 14 (R., p. 19). Six white men have been sentenced to death for these offenses but only one has been electrocuted (R., p. 19). The single white man actually electrocuted, Robert Wesley Davis, was convicted of raping an eleven-year old white child under extraordinarily aggravated circumstances (see, *Davis* v. *State,* 123 So.2d 703 (Fla., 1960)).

Of the other five whites originally condemned to die, three raped white children ranging in age from 9 to 13, and in all three cases the State Pardon Board commuted their sentence to life imprisonment (R., p. 15). The final two were co-defendants convicted of raping a single white adult (R., p. 15). The jury verdicts finding them guilty without recommendation of mercy were reversed by the Supreme Court of Florida which found that the judgment of death had been the result of prejudicial comments made by the trial judge. *Raulerson* v. *State,* 102 So.2d 281 (1958). No white man has been electrocuted for the rape of a white adult or even sentenced to death for the rape of a Negro adult or child.

The remaining 48 men who received sentences of death were all Negroes (R., p. 16). Of these, 29 have already been electrocuted, and 12 others are presently awaiting execution on death row at the Florida State Prison (R., pp. 16-17). The death sentences of four other Negroes were reversed by the Supreme Court of Florida (R., p. 17) (*Harris* v. *State,* 162 So.2d 262 (1964); *Bell* v. *State,* 93 So.2d 575 (1957); *Truluck* v. *State,* 108 So.2d 748 (1959)); they thereafter received lesser sentences. A sheriff killed one Negro en route to a new trial after his conviction was

reversed by *Shepherd* v. *Florida*, 341 U.S. 50. The Pardon Board commuted the death sentences of the remaining two Negroes who were given the death penalty for rape (R., p. 17).

Of 84 convictions of Negro men for the rape of white women, 45 resulted in sentences of death (53%) (R., p. 19). Only one of these cases involved the rape of a white child. Thus, 44 Negro defendants have been sentenced to death for the rape of white adult women; 29 of them have been executed and ten await execution *(Ibid.)*.

On the other hand, in the 68 cases in which Negro males have been convicted of raping Negro women (26 cases involving children under 14), only three have been sentenced to death. All three of these convictions were for attacks on children; two defendants are presently awaiting execution *(Ibid.)*. The third conviction was reversed by the Supreme Court of Florida. (*Bell* v. *State*, 93 So.2d 575 (1957).) Therefore, to date no Negro has been electrocuted for the rape of another Negro adult or child.

Statistics introduced with regard to the actions of the Florida State Board of Pardons also show a disparity in the treatment of white and Negro defendants. The Board has heard 38 appeals for clemency from convicted rapists out of the 54 death sentences for rape, and commuted three of the four white death sentences. On the other hand, it denied relief to 32 of the 34 Negro applicants (R., p. 20).

These results contrast sharply with treatment afforded those convicted of murder. Since January 1, 1924, the Pardon Board heard pleas from 216 convicted murderers, of which 129 were Negroes and 85 white, and two of unknown race. Thirty-three, or 25.6%, of the Negroes and 21, or 24.7%, of the whites secured commutation of sen-

tence (R., p. 20). In other words, for murder, no racial factor seems to operate in deciding clemency applications.

To summarize, between January 1, 1940 and December 31, 1964, fifty-four men were sentenced to death in Florida following convictions for the crime of rape. Six of the 54 men who received the death sentence were white, the balance, 48, were Negroes. However, only one white was actually executed (for the aggravated rape of a white child), while 29 Negroes have been electrocuted, (all of whom were convicted of raping white adult women) and twelve others (ten of whom raped white women) are presently awaiting execution.

These statements of fact are not disputed. No inference other than one of racial discrimination in application of the death penalty has been offered.

## How the Federal Questions Were Raised and Decided Below

After the affirmance of his conviction and sentence by the Supreme Court of Florida on June 27, 1963, petitioner filed a motion for reduction of sentence from death to a term of years in the Circuit Court of Leon County (R., pp. 8-10). The ground for the motion was that the sentence of death was a denial of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Therefore, Sec. 794.01, Fla. Stat. Ann., was unconstitutional on its face and as applied to him. The motion was denied, and petitioner appealed to the Supreme Court of Florida. That court accepted jurisdiction, considering the motion as a collateral, post-conviction assault on a judgment of conviction within the scope of the Florida Criminal Procedure Rule No. 1, Fla. Stat. Ann., Chapter 924, Ap-

pendix. The denial of the motion by the lower court, upholding the statute as valid under the federal Constitution, was affirmed on the merits. (179 So.2d at 204.)

## Reasons for Granting the Writ

### I.

### Certiorari Should Be Granted to Determine Whether the Application to Petitioner of Florida's Death Penalty for Rape Is Unconstitutional Because an Unrebutted Prima Facie Showing Has Been Made of Its Racial Application in Violation of the Equal Protection Clause of the Fourteenth Amendment.

Seventeen American States retain capital punishment for rape. Nevada permits imposition of the penalty only if the offense is committed with extreme violence and great bodily injury to the victim;[4] the remaining sixteen jurisdictions—which allow their juries absolute discretion to punish any rape with death—are all southern or border states.[5] The federal jurisdiction and the District of Colum-

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[4] Nev. Rev. Stat. §200.360 (1963). See also §200.400 (aggravated assault with intent to rape).

[5] The following sections punish rape or carnal knowledge unless otherwise specified. Ala. Code §§14-395, 14-397, 14-398 (Recomp. Vol. 1958); Ark. Stat. Ann. §§41-3403, 43-2153 (1964 Repl. Vols.); see also §41-3405 (administering potion with intent to rape); §41-3411 (forcing marriage); Fla. Stat. Ann. §794.01 (1964 Cum. Supp.); Ga. Code Ann. §§26-1302, 26-1304 (1963 Cum. Supp.); Ky. Rev. Stat. Ann. §435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950) (called aggravated rape but slight force is sufficient to constitute offense; also includes carnal knowledge); Md. Ann. Code, art. 27, §§461, 462 (1957); see also art. 27, §12 (assault with intent to rape); Miss. Code Ann. §2358 (recomp. Vol. 1956); Vernon's Mo. Stat. Ann. §559.260 (1953); N.C. Gen. Stat. §14-21 (Recomp. Vol. 1953); Okla. Stat. Ann., tit. 21, §§1111, 1114, 1115 (1958); S.C. Code Ann. §§16-72, 16-80 (1962) (includes assault with attempt to rape as well as rape and carnal knowledge); Tenn. Code Ann. §§39-3702, 39-3703,

bia, with its own strong southern traditions, also allow the death penalty for rape.[6]

Between 1930 and 1962, two years before petitioner was sentenced to die, 446 persons were executed for rape in the United States. Of these, 399 were Negroes, 45 were whites, and 2 were Indians. All were executed in southern or border States or the District. The percentages—89.5% Negro, 10.1% white—are revealing when compared to similar racial percentages of persons executed during the same years for murder and other capital offenses. Of the total number of persons executed in the United States, 1930-1962, for murder, 49.1% were Negro; 49.7% were white. For other capital offenses, 45.6% were Negro; 54.4% were white. Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District of Columbia never executed a white man for rape during these years. Together they executed 66 Negroes. Arkansas, Delaware, Florida, Kentucky and Missouri each executed one white man for rape between 1930 and 1962. Together they executed 71 Negroes. Putting aside Texas (which executed 13 whites and 66 Negroes), sixteen Southern and border States and the District of Columbia between 1930 and 1962 executed 30 whites and 333 Negroes for rape: a ratio of better than one to eleven. Clearly, unless the incidence of rape by Negroes is many times that of rape by whites, capital punishment for rape survives in the twentieth century principally as an instrument of racial discrimination.[7]

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39-3704, 39-3705 (1955); Tex. Pen. Code Ann., arts. 1183, 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960); see also §18.1-16 (attempted rape).

[6] 18 U.S.C. §2031 (1964); 10 U.S.C. §920 (1964); D.C. Code Ann. §§22-2801 (1961).

[7] The figures in this paragraph are taken from UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 32; *Executions, 1962* (April 1963). Table 1 thereof shows the follow-

If this be so—if the racially unequal results in these States derive from any cause which takes account of race

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ing executions under civil authority in the United States between 1930 and 1962:

MURDER

| | Total | White | Negro | Other |
|---|---|---|---|---|
| Number | 3298 | 1640 | 1619 | 39 |
| Per Cent | 100.0 | 49.7 | 49.1 | 1.2 |

RAPE

| | Total | White | Negro | Other |
|---|---|---|---|---|
| Number | 446 | 45 | 399 | 2 |
| Per Cent | 100.0 | 10.1 | 89.5 | .04 |

OTHER OFFENSES

| | Total | White | Negro | Other |
|---|---|---|---|---|
| Number | 68 | 37 | 31 | 0 |
| Per Cent | 100.0 | 54.4 | 45.6 | 0.0 |

Table 2 thereof shows the following executions under civil authority in the United States between 1930 and 1962, for the offense of rape, by State:

| | White | Negro | Other |
|---|---|---|---|
| Federal | 2 | 0 | 0 |
| Alabama | 2 | 20 | 0 |
| Arkansas | 1 | 17 | 0 |
| Delaware | 1 | 3 | 0 |
| District of Columbia | 0 | 2 | 0 |
| Florida | 1 | 35 | 0 |
| Georgia | 3 | 58 | 0 |
| Kentucky | 1 | 9 | 0 |
| Louisiana | 0 | 17 | 0 |
| Maryland | 6 | 18 | 0 |
| Mississippi | 0 | 21 | 0 |
| Missouri | 1 | 7 | 0 |
| North Carolina | 4 | 41 | 2 |
| Oklahoma | 0 | 4 | 0 |
| South Carolina | 5 | 37 | 0 |
| Tennessee | 5 | 22 | 0 |
| Texas | 13 | 66 | 0 |
| Virginia | 0 | 21 | 0 |
| West Virginia | 0 | 1 | 0 |
| | 45 | 399 | 2 |

as a factor in meting out punishment—a Negro punished by death is denied, in the most radical sense, the equal protection of the laws.[8] One of the cardinal purposes of the Fourteenth Amendment was the elimination of racially discriminatory criminal sentencing. The First Civil Rights Act of April 9, 1866, ch. 31, §1, 14 Stat. 27, declared the Negroes citizens of the United States and guaranteed that "such citizens, of every race and color, . . . shall be subject to like punishment, pains, and penalties [as white citizens], and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The Fourteenth Amendment was designed to elevate the Civil Rights Act of 1866 to constitutional stature. See, e.g., *tenBroek, Thirteenth Amendment to the Constitution of the United States,* 39 CALIF. L. REV. 171 (1951); *Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights,* 2 STAN. L. REV. 5 (1949). The Enforcement Act of May 31, 1870, ch. 114, §§16, 18, 16 Stat. 140, 144, implemented the Amendment by re-enacting the 1866 act and extending its protection to all persons. This explicit statutory prohibition of racially discriminatory sentencing survives today as REV. STAT. §1977 (1875), 42 U.S.C. §1981 (1964).

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[8] The contention that racially discriminatory application of the death penalty in rape cases denies equal protection has been raised in a number of cases now pending in state and federal courts. See, e.g., *Mitchell* v. *Stephens,* 232 F. Supp. 497, 507 (E.D. Ark. 1964), appeal pending; *Moorer* v. *MacDougall,* U.S. Dist. Ct., E.D.S.C., No. AC-1583, appeal pending; *Aaron* v. *Holman,* U.S. Dist. Ct., M.D. Ala., C.A. No. 2170-N, proceedings on petition for writ of habeas corpus stayed pending exhaustion of state remedies July 2, 1965; *Swain* v. *Alabama,* Ala. Sup. Ct., 7 Div. No. 699, petition for leave to file petition for writ of error coram nobis denied June 25, 1965, cert. denied, —— U.S. ——, 15 L.ed.2d 353; *Maxwell* v. *Stephens,* 348 F.2d 325 (8th Cir. 1965), cert. denied, —— U.S. ——, 15 L.ed.2d 353; *Alabama* v. *Billingsley,* Cir. Ct. Etowah County, No. 1159, motion for new trial and motion for reduction of sentence pending; *Sims* v. *Georgia,* 144 S.E.2d 103, petition for cert. pending, Misc. 918; *Louisiana ex rel. Scott* v. *Hanchey,* 20th Jud. Dist. Ct., Parish of West Feliciana, petition for habeas corpus pending.

For purposes of the prohibition, it is of course immaterial whether a State writes on the face of its statute books: "Rape shall be punishable by imprisonment . . ., except that rape by a Negro of a white woman, or any other aggravated and atrocious rape, shall be punishable by death by electrocution," or whether the State's juries read a facially color-blind statute to draw the same racial line. Discriminatory application of a statute fair upon its face is more difficult to prove, but no less violates the State's obligation to afford all persons within its jurisdiction the equal protection of the laws. See, e.g., *Yick Wo* v. *Hopkins,* 118 U.S. 356; *Niemotko* v. *Maryland,* 340 U.S. 268 (alternate ground); *Fowler* v. *Rhode Island,* 345 U.S. 67; *Hamilton* v. *Alabama,* 376 U.S. 650 (per curiam). And it does not matter that the discrimination is worked by a number of separate juries functioning independently of each other rather than by a single state official. However it may divide responsibility internally, the State is federally obligated to assure the equal application of its laws. This Court has long sustained claims of discriminatory jury exclusion upon a showing of exclusion continuing during an extended period of years, without inquiry whether the same jury commissioners served throughout the period. E.g., *Neal* v. *Delaware,* 103 U.S. 370; *Bush* v. *Kentucky,* 107 U.S. 110; *Hernandez* v. *Texas,* 347 U.S. 475. Congress, when it enacted the 1866 Civil Rights Act knowing that "In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense," [9] intended precisely by the Act, and subsequently by the Fourteenth Amendment, to disallow such "custom" as it operated through the sentences imposed by particular judges and juries.

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[9] Cong. Globe, 39th Cong., 1st Sess. 1758 (4/4/1866) (remarks of Senator Trumbull, who introduced, reported and managed the bill which became the act.) See also, *Id.,* at 475 (1/29/1866) and 1759 (4/4/1866).

The petitioner asks this court to consider whether he has not made a showing of racially discriminatory capital sentencing under Florida's rape statute sufficient to throw some burden of explanation on the state. Because of the Fourteenth Amendment's overriding purpose to secure racial equality, "racial classifications [are] 'constitutionally suspect,' . . . and subject to the 'most rigid scrutiny'." *McLaughlin* v. *Florida*, 379 U.S. 184, 192. This principle has as its corollary that a sufficient initial showing of unequal treatment of the races is made whenever it appears that the races are substantially disproportionately represented in groups of persons differently disposed of under those procedures: such a showing compels the inference that a State is drawing the racial line unless the State offers some justification in non-racial factors for the disproportion. See, e.g., *Norris* v. *Alabama*, 294 U.S. 587; *Hernandez* v. *Texas*, 347 U.S. 475; *Gomillion* v. *Lightfoot*, 364 U.S. 339; cf. *Oyama* v. *California*, 332 U.S. 633.

Here the demonstrated disproportion is extreme. Over a twenty-five year period, between January 1, 1940 and December 31, 1964, 48 of the men sentenced to die for rape were Negroes and only 6 were white—a ratio of eight to one. The evidence also shows that this disparity cannot be accounted for by a greater number of Negroes being convicted for rape, since in the same period 152 Negroes, 132 Whites, and 1 Indian were so convicted.

The Florida statistics take on added significance when the race of the rape victim is considered. In the twenty-five year period only one white man was actually executed and that was for the rape of an eleven year old white child under extremely aggravated circumstances. Of the five other whites sentenced to death (but whose sentences were either reversed or commuted) three had raped white chil-

dren ranging in age from nine to five, and the other two had raped a single white adult.

All twenty-nine of the Negroes who have been executed, and ten of the twelve presently awaiting execution, were convicted of raping white women. (The other seven Negroes sentenced to die have had their sentences of death reversed by a higher court, or have had their death sentences commuted by the Pardon Board.) A total of forty-four of the forty-eight Negro defendants have been sentenced to death or electrocuted for the rape of white adult women. No Negro or white, to date, has been electrocuted for the rape of a Negro adult or child. Three other Negroes have been sentenced to death for raping Negro children, with one having his conviction reversed by the Supreme Court of Florida. (See *Statement, supra.*)

This is at least sufficient evidence to make an initial showing of racial discrimination and to transfer the burden of explanation to the State. While determination of the relative influence of the racial factor, as opposed to factors arising from the circumstances of the individual cases, would be aided by data detailing the facts of each prosecution for rape, the burden should be on the state to demonstrate the countervailing influence of such factors since it should have the responsibility of rebutting the inference raised by the above statistics, and since if such a showing can be made, the state has the resources available to do so.

The trial court, and the Supreme Court of Florida, although accepting the correctness of petitioner's statistical showing, held that the Florida statute was constitutional both on its face and as applied to petitioner without discussion. No attempt was made by the state at any part of the proceeding to explain or justify the discrepancy in the application of the death penalty clearly demonstrated by the statistics summarized above.

This Court should hold that the State may not thus remain silent in the face of such a record. Several considerations support the holding.

First, the hypothesis of racial discrimination is particularly likely in view of the coincidence between the Florida figures and those of the other jurisdictions—all southern—which have executed persons for rape during the past thirty years. For all jurisdictions, the Negro-white ratio is nine to one—although for other crimes than rape it is about one to one. Studies and observations by students of the criminal process tend to support the hypothesis of discrimination. *E.g., Bullock, Significance of the Racial Factor in the Length of Prison Sentences,* 52 J. CRIM. L., CRIM. & POL. SCI. 411 (1961); *Wolfgang, Kelly & Nolde, Comparison of the Executed and the Commuted among Admissions to Death Row,* 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); *Hartung, Trends in the Use of Capital Punishment,* 284 ANNALS 8, 14-17 (1952); WEIHOFEN, THE URGE TO PUNISH 164-165 (1956).

Second, put in the context of the broader picture of Florida life and law, the inference that these death penalties were racially motivated becomes overwhelming. Florida still by statute forbids the intermarriage of whites with Negroes, (Fla. Const., Art. 16, §24; Fla. Stat. Ann. §§741.11-741-16), and only recently was its statute prohibiting interracial cohabitation struck down by this Court. *McLaughlin* v. *Florida,* 379 U.S. 184. (Fla. Stat. Ann. §798.05. See also, §798.04.) The lesson the State thus officially teaches its citizens respecting the abhorrence in which even voluntary interracial sexual relations should be held cannot help but have an impact on the views which a criminal jury will hold of an interracial rape. Cf. *Peterson* v. *City of Greenville,* 373 U.S. 244; *Lombard* v. *Louisiana,* 373 U.S. 267; *Robinson* v. *Florida,* 378 U.S. 153.

Finally, in this context, the absolute discretion which Florida law gives jurors to decide between life and death, undirected by any rational standards for making that decision (see part II *infra*), invites the influence of arbitrary and discriminatory considerations. This Court has long been concerned with a vagueness of criminal statutes which "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263. See, e.g., *Smith* v. *Cahoon*, 283 U.S. 553; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445; *Connally* v. *General Construction Co.*, 269 U.S. 385; *Winters* v. *New York*, 333 U.S. 507. The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury caprice and suasion by impermissible considerations, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433; *Freedman* v. *Maryland*, 380 U.S. 51, 56; *Lewis, The Sit-In Cases: Great Expectations*, [1963] SUPREME COURT REVIEW 101, 110; Note, 109 U.Pa.L.Rev. 67, 90 (1960), including racial considerations, see *Louisiana* v. *United States*, 380 U.S. 145; *Dombrowski* v. *Pfister*, 380 U.S. 479; *Cox* v. *Louisiana*, 379 U.S. 536. Unlimited sentencing discretion in a capital jury presents this vice in the extreme. To paraphrase *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505: "Under such a standard the most careful and tolerant [lay juror] . . . would find it virtually impossible to avoid favoring one [race] . . . over another."

Petitioner requests the Court to grant certiorari to review and reverse the judgment of the Supreme Court of Florida, which left the sentence of death standing after petitioner had made an unrebutted prima facie showing that he had been denied equal treatment in the most grievous penalty known to law.

## II.

**The Court Should Grant Certiorari to Consider Petitioner's Contention That His Sentence Is Unconstitutional Under the Eighth and Fourteenth Amendments.**

Petitioner alleged that he was unconstitutionally sentenced without consideration of aggravating or mitigating circumstances, pursuant to §794.01 of the Florida Statutes Annotated, which statute on its face and as applied prescribes the imposition of cruel and unusual punishment in violation of the Fourteenth Amendment. This question, which three Justices of the Court thought deserving of certiorari in *Rudolph* v. *Alabama,* 375 U.S. 889, has been deemed by both the Fourth and Eighth circuits as one which "must be for the Supreme Court in the first instance." *Maxwell* v. *Stephens,* 348 F.2d 325, 332 (8th Cir. 1965) cert. denied, ..... U.S. ....., 15 L.Ed. 2d 353. The Fourth Circuit has taken the same view. *Ralph* v. *Pepersack,* 335 F.2d 128, 141 (4th Cir. 1964), cert. denied, 380 U.S. 925. Petitioner respectfully requests the judgment of the Court on the issue.

The question posed is not whether on any rational view which one might take of the purpose of criminal punishment, the defendant's conduct as the jury might have found it at its worst on this record could support a death sentence consistent with civilized standards for the administration of criminal law. As the issue of penalty was submitted to the jury in their unlimited discretion under Florida procedure, their attention was directed to none of the purposes of criminal punishment, nor to any aspect or aspects of the defendant's conduct. They were not invited to consider the extent of physical harm to the prose-

cutrix, the moral heinousness of the defendant's acts, his susceptibility or lack of susceptibility to reformation, the extent of the deterrent effect of killing the defendant *"pour decourager les autres."* Cf. *Packer, Making the Punishment Fit the Crime,* 77 Harv. L. Rev. 1071 (1964).

The absence of these or any other standards to guide a Florida jury in determining whether a defendant should live or die render the procedure violative of due process under the rationale of *Giacco* v. *Pennsylvania,* —— U.S. ——, 34 U.S.L.W. 4099. There this Court struck down the Pennsylvania statute allowing a jury to assess the costs of a criminal proceeding on an acquitted defendant, because of an absence of any standards on which the jury could rationally base its decision. The Court said:

> Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. 34 U.S.L.W. 4100.[10]

Under the Florida procedure the jurors were permitted to choose between life and death upon conviction for any reason, rational or irrational, or for no reason at all: at a whim, a vague caprice or because of the color of petitioner's skin if that did not please them. In making the determination to impose the death sentence, they acted

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[10] Petitioner recognizes that the Court disclaimed any implications as to the validity of established sentencing procedures. However, he submits that the combination of the evident intrusion of race as a factor in the decision, the imposition of the extreme penalty, and the simultaneous decision as to verdict and sentence (see Part III, *infra*) involved here make the rational of *Giacco* particularly applicable.

wilfully and unreviewably, without standards and without direction. Nothing assured that there would be the slightest thread of connection between the sentence they exacted and any reasonable justification for exacting it. Cf. *Skinner* v. *Oklahoma,* 316 U.S. 535. A judgment so unconfined, so essentially erratic, is *per se* cruel and unusual because it is purposeless, lacking in any relationship by which its fitness to the offense, or to the offender or to any legitimate social purpose may be tested. It is cruel not only because it is extreme but because it is wanton; and unusual not only because it is rare, but because the decision to remove the defendant from the ordinary penological regime is arbitrary. To concede the complexity and interrelation of sentencing goals, see *Packer, supra,* is no reason to sustain a statute which ignores them all. It is futile to put forward justifications for a death so inflicted; there is no assurance that the infliction responds to the justification or will conform to it in operation. Inevitably under such a sentencing regime, capital punishment in those few, arbitrarily selected cases where it is applied both is " 'disproportioned to the offenses charged' " and constitutes " 'unnecessary cruelty.' " *Rudolph* v. *Alabama, supra,* 375 U.S. at 891.[11]

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[11] The United States Department of Justice has taken the following position on continued imposition of the death penalty: "We favor the abolition of the death penalty. Modern penology with its correctional and rehabilitation skills affords greater protection to society than the death penalty which is inconsistent with its goals. This Nation is too great in its resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime." Letter of Deputy Attorney General Ramsey Clark to the Honorable John L. McMillan, Chairman, District of Columbia Committee, House of Representatives, July 23, 1965, reported in New York Times, July 24, 1965, p. 1, col. 5.

## III.

**The Court Should Grant Certiorari to Decide Whether Florida's Single Verdict Procedure Allowing the Jury Which Determines Guilt Simultaneously to Fix Capital Punishment for Rape Violates the Due Process Clause of the Fourteenth Amendment.**

Under the procedure here employed by the State of Florida, the jury which found petitioner guilty of rape was required simultaneously to determine by its vote whether he should be electrocuted or suffer imprisonment. Section 794.01, Florida Statutes, provides:

> Whoever ravishes and carnally knows a female of the age of ten years or more . . . shall be punished by death, unless a majority of the jury in their verdict recommend mercy, in which event punishment shall be by imprisonment in the state prison for life, or for any term of years within the discretion of the judge. . . .

The Florida courts read this statute as requiring a single verdict: a jury which finds guilt determines sentence without receiving further evidence or instruction, indeed, without even returning to the courtroom.

This procedure thrust upon petitioner, at the outset of the trial, an intolerable choice: On the one hand, he could decide not to testify, relying on his privilege under the Fifth and Fourteenth Amendments. *Malloy* v. *Hogan,* 378 U.S. 1. But were he convicted, the jury would determine his sentence with no knowledge whatsoever of his background or personality or of any mitigating circumstances; the jury would know none of the information which settled views of penology consider indispensable to a rational sen-

tencing decision. See *Williams* v. *New York,* 337 U.S. 241, 247-8. Indeed, the full consideration of the circumstances of a crime may be necessary for "the exercise of a sound discretion" as required by due process. See, *Williams* v. *Oklahoma,* 358 U.S. 576, 585.

On the other hand, the petitioner could at the outset of the trial decide to take the stand, so that, in the event of a guilty verdict, his jury could impose sentence based on some quantum of information. But petitioner could thus purchase a rational sentence only by surrender of his privilege against self-incrimination. The surrender could be costly: the prosecution would be permitted to counter with otherwise inadmissible evidence, *e.g.,* evidence of bad character, including unrelated crimes, Section 921.13, Florida Statutes; *Williams* v. *State;* 110 So.2d 654, 661 (1959); *Davis* v. *State,* 123 So.2d 703 (1960). Even were a jury given cautionary instructions that such evidence should be considered on the issue of sentence alone, the determination of guilt would inevitably be prejudiced. As Judge Learned Hand remarked, such cautionary instructions are only "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." See *Nash* v. *United States,* 54 F.2d 1006, 1007 (2d Cir. 1932), cert. denied, 285 U.S. 556.

In sum, the Florida single-verdict procedure here employed requires a defendant to choose between a procedure that threatens a fair trial on the issue of guilt and one that detracts from a rational determination of the sentence. See, A.L.I., Model Penal Code, Tent. Draft No. 9 (May 8, 1959), Comment to §201.6, at 74-76.

Other procedures employed by Florida in rape prosecutions exacerbate, rather than mitigate, the harshness of the choice which a defendant is required to make. The jury

is given no instruction by the court on the manner in which it should proceed in imposing sentence; it is left completely without guidance. The juror's oath offers no help: on the subject of sentence, it is silent.[12] Thus deterred by neither instruction nor oath, the jury is free to vote its prejudices. (The comparative record of death sentences imposed on Negro and white defendants in rape cases suggests that Florida juries make full use of this freedom.) Moreover, if the jury is unable to decide by majority vote whether a defendant shall live or die, the statute requires that he die—only the vote of a "majority" for mercy permits the court to impose a jail sentence rather than death. Finally, the sentence resulting from these procedures may not be reviewed or modified on appeal; as long as it is within the statute, review of the sentence is outside the jurisdiction of any appellate court, *Davis* v. *State,* 123 So.2d 703 (1960).

Florida's simultaneous submission of guilt and sentence to a jury is much akin to New York's former practice of simultaneously submitting to a jury the two issues of the voluntary nature of a confession and the guilt of the accused. The former New York practice was, of course, struck down by this Court in *Jackson* v. *Denno,* 378 U.S. 368, where the Court recognized the prejudice inevitable when guilt and another issue are determined simultaneously:

> . . . an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination. . . .

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[12] The oath administered to jurors in Florida reads, Section 913.11, Florida Statutes Annotated:

> "You do solemnly swear (or affirm) that you will well and truly try the issues between the State of Florida and the defendant whom you shall have in charge and a true verdict render according to the law and evidence, so help you God."

> Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence. (378 U.S. 368, 389, n. 16.)

And see also, *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964), holding that a Negro defendant may not constitutionally be required to choose between trial to a jury from which Negroes are excluded and trial to a jury prejudiced by defendant's demand for Negro participation.

The single-verdict procedure not only thrusts upon the defendant an intolerable choice between unfairnesses, but it operates also to insure that, if found guilty, he will be sentenced upon less than all pertinent information. For as this Court recognized in *Williams* v. *New York,* 337 U.S. 241, 247-8, the exclusionary rules customary and appropriate to trial of the issue of guilt will bar receipt of much evidence properly to be considered on sentence.

As pointed out in the dissent below, a simple alternative to the single-verdict procedure is available under the Florida statutes: the issue of innocence or guilt could be tried first, with all appropriate evidentiary safeguards observed. Should the jury return a guilty verdict, it could then hear all material pertinent to sentence, and then render a just, informed determination.

For Florida to insist upon the single verdict under these circumstances constitutes, petitioner submits, a denial to petitioner of due process of law.

The procedure employed by Florida is used by many states, and 18 U.S.C. §2113(e) permits federal juries to impose the death penalty.[13] The question of whether this

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[13] 18 U.S.C. §2113(e): "Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to

procedure violates the requirements of due process of law has been raised often in the Third and Second Circuits and in the District of Columbia Circuit. See, *United States ex rel. Rucker* v. *Myers,* 311 F.2d 311 (3rd Cir. 1962), cert. denied, 374 U.S. 844; *United States ex rel. Scoleri* v. *Bonmiller,* 310 F.2d 720 (3rd Cir. 1962), cert. denied, 374 U.S. 828; *United States* v. *Curry,* —— F.2d —— (2nd Cir. No. 29000, Dec. 22, 1965); *Frady* v. *United States,* 348 F.2d 84 (D.C. Cir. 1965). Although the procedure has been upheld, its validity was seriously questioned in *Frady* and *Curry, supra,* and one justice of the Supreme Court of Florida urged in the present case that it violates constitutional standards; in all instances the case of *Jackson* v. *Denno, supra,* was cited.

Therefore, the issue of due process here presented is of general importance and interest and warrants the grant of certiorari. Moreover, in the present case the vice of the procedure is demonstrated in its starkest form. Florida allows the jury, unguided by any standards or instructions and exercising a discretion not reviewable by any court, to send a defendant to his death; it permits the jury to exercise freely the prejudices called up by the race of the defendant and the victim; and it does not even give the defendant an opportunity freely to present evidence to mitigate the penalty.

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free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct."

However, federal courts have pointed out that having the jury decide the sentence after rendering the verdict is fully consistent with §2113(e) and is more compatible with Rule 32(a) of the Federal Rules of Criminal Procedure. ("Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.") *United States* v. *Curry* (2nd Cir. No. 29000, Dec. 22, 1965, Slip Opinion at 3560).

## CONCLUSION

**For the foregoing reasons the petition for writ of certiorari should be granted.**

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
LEROY D. CLARK
MICHAEL MELTSNER
CHARLES STEPHEN RALSTON
10 Columbus Circle
New York, New York 10019

TOBIAS SIMON
H. W. DIXON
MAURICE ROSEN
223 Southeast First Street
Miami 32, Florida

*Attorneys for Petitioner*

JAY H. TOPKIS
575 Madison Avenue
New York, New York

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pennsylvania

*Of Counsel*